

October 15, 1991

Mr. Cenric S. K. Ho
Health Fund Administrator
Hawaii Public Employees Health Fund
Department of Budget and Finance
P. O. Box 2121
Honolulu, Hawaii 96805

Dear Mr. Ho:

Re: Inter-Agency Disclosure of Health Fund Membership Lists

This is in response to your letter to the Office of Information Practices ("OIP") dated July 23, 1991 requesting an advisory opinion concerning the above-referenced matter.

ISSUE PRESENTED

Whether, under the Uniform Information Practices Act (Modified), chapter 92F, Hawaii Revised Statutes ("UIPA"), the Department of Budget and Finance, Hawaii Public Employees Health Fund ("Health Fund"), may disclose confidential information from its membership lists to the Department of Personnel Services as part of a demographic study of state civil service employees.

BRIEF ANSWER

Under section 92F-19(a)(3), Hawaii Revised Statutes, the disclosure of otherwise confidential information to another governmental agency is permissible provided that the disclosure is reasonably proper for the performance of the requesting agency's duties and functions. The State Department of Personnel Services ("DPS") has requested access to confidential information contained in the Health Fund's membership lists. The DPS intends to use the information to assist it in the design of benefit programs for State workers.

Because arguably, the use to which this information will be put is reasonably related to the performance of DPS' duties and functions, we believe that the Health Fund's disclosure of the information to DPS is permissible. However, confidential information disclosed under section 92F-19, Hawaii Revised Statutes, does not lose its confidential status once it is received by the requesting agency. Thus, any further disclosure of the information by the requesting agency must also be authorized by section 92F-19, Hawaii Revised Statutes, or the requesting agency personnel could be subject to civil and/or criminal penalties for an unauthorized disclosure.

FACTS

The DPS has entered into a contract with the University of Hawaii at Manoa, Social Science Research Institute ("SSRI"), to conduct a demographic study of the State's civil service work force. The contract states that one of the purposes of the study is to:

Provide a State Workforce Demographics Analysis Report which gives a statistical analysis of the state civil service workforce, by department, utilizing information available through currently maintained databases with the State system (e.g., employees' age, sex, occupations, geographic location, terminations/transfer trends, health coverages, etc.).

Such an analysis would be used for planning purposes, such as in assessing the number of employees with dependents who may benefit from child care programs, identifying specific departments with high turnover rates which should be targeted for intensive employee retention efforts, etc.

In furtherance of the contract, the DPS requested access to the Health Fund's membership listing which contains personal information about its members, including each member's home address, social security number, number of dependents, the plans in which the employee and his/her family members are enrolled, and designated life insurance beneficiaries. After the OIP's review of the Health Fund's request, the DPS narrowed its original request to the Health Fund. The DPS now seeks access to only the birthdates of employees' dependents and the employee's social security numbers. It is our understanding that the social security numbers will be used as identifiers to correlate the data received from other files to ensure accuracy and avoid duplication.

DISCUSSION

The UIPA begins with the premise that "[a]ll government records are open to public inspection unless access is restricted or closed by law." Haw. Rev. Stat. . 92F-11(a) (Supp. 1990). Section 92F-3, Hawaii Revised Statutes, sets forth the UIPA's definition of the term "government record," which includes information maintained by agencies in electronic form, such as the information that is the subject of this opinion. Under the UIPA, the term "government record" means:

[I]nformation maintained by an agency in written, auditory, visual, electronic, or other physical form."

Haw. Rev. Stat. . 92F-3 (Supp. 1990).

The UIPA provides exceptions to the general rule that all government records are "public." Two of its exceptions are relevant to the facts before us. Section 92F-13(1), Hawaii Revised Statutes, precludes disclosure where to do so would result in a clearly unwarranted invasion of privacy. Under section 92F-13(3), Hawaii Revised Statutes, an agency is authorized to withhold government records that, by their nature, must be kept confidential in order for the government to avoid the frustration of a legitimate government function.

We have previously opined that an individual's social security number is information which, if disclosed, would constitute a clearly unwarranted invasion of personal privacy. In OIP Opinion Letter No. 89-4 (November 9, 1989), we first addressed the question of the status of social security numbers when they are included in otherwise disclosable records. We concluded that individuals have a significant privacy interest in their social security numbers which is not outweighed by a public interest in disclosure. Our view is in accord with prevailing federal case law on this subject as well. See, e.g., IBEW Local No. 5 v. United States Department of Housing and Urban Development, 852 F.2d 87 (3rd Cir. 1988) (the disclosure of federal contract employees' social security numbers to a labor organization was a clearly unwarranted invasion of privacy under the privacy exemption to the federal Freedom of Information Act).

In OIP Opinion Letter No. 90-7 (February 9, 1990), we addressed whether the birthdates and social security numbers of those holding teacher certificates could be disclosed to a

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national clearinghouse association to facilitate the exchange of information about the status of teachers' certifications. We concluded:

Because the significant privacy interest in a former licensee's social security number and birthdate outweighs the public interest in disclosure, disclosure of this information would constitute a clearly unwarranted invasion of personal privacy and is not permitted under the UIPA. Yet, disclosure of an individual's social security number or birthdate is authorized in other specific circumstances in accordance with the UIPA, none of which exists under the facts presented.

OIP Op. Ltr. No. 90-7 at 10 (emphasis added).

Although we find that the information requested by the DPS is confidential under the UIPA's privacy exception, the UIPA does provide limited situations in which otherwise confidential information may be disclosed by one government agency to another governmental agency. Section 92F-19, Hawaii Revised Statutes, provides in pertinent part as follows:

. 92F-19 Limitations on disclosure of government records to other agencies. (a) No agency may disclose or authorize disclosure of government records to any other agency unless the disclosure:

. . . .

(3) Reasonably appears to be proper for the performance of the requesting agency's duties and functions;

Haw. Rev. Stat. . 92F-19(a)(3) (Supp. 1990).

The UIPA is modeled on the 1980 version of the Uniform Information Practices Code ("Model Code") adopted by the National Conference of Commissioners on Uniform State Laws, which in turn is based extensively on provisions of the federal Freedom of Information Act, 5 U.S.C. . 552 (1988 & Supp. 1990) and the federal Privacy Act of 1974, 5 U.S.C. . 552a (1988 & Supp. 1990). A review of the legislative history of the UIPA indicates that the Legislature intended "that the commentary to the Model Code guide the interpretation of similar provisions

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found in the Uniform Act" H. Stand. Comm. Rep. No. 342-88, 14th Leg., 1988 Reg. Sess., Haw. H.J. 969 (1988).

It is a general rule of statutory construction that laws on the same subject matter be construed with reference to each other. See Haw. Rev. Stat. . 1-16 (1985). Moreover, Hawaii law specifically mandates that uniform laws, such as the Model Code, be "interpreted and construed to effectuate their general purpose to make uniform the laws of the states and territories which enact them." Haw. Rev. Stat. . 1-24 (1985).

Section 3-103(a)(1), Model Code permits the disclosure of otherwise confidential information to another agency if the disclosure is "necessary to the performance of its duties and functions, and compatible with the purpose for which the information in the record was originally collected or obtained."

The commentary to section 3-103(a)(1) sheds some light on this two-step analysis and suggests that one of section 3-103's central principles was to develop a process that would "require agencies to collect information directly from the individual to whom it pertains" rather than allow government agencies to create dossiers on individuals by collecting information from existing files in other government agencies.

Although the Legislature did not adopt section 3-103 of the Model Code verbatim, its principles were incorporated into the predecessor of part III of the UIPA, chapter 92E, Hawaii Revised Statutes, portions of which now form a part of chapter 92F, Hawaii Revised Statutes.¹ Thus, the UIPA provides that in the absence of a showing that the requesting agency's use of the information reasonably appears proper for the performance of the requesting agency's duties and functions, the legislative preference is clearly that the requested information be obtained directly from the individual to whom it pertains. Convenience and administrative efficiency do not appear to be factors the Legislature intended to be considered where privacy interests are at stake.

¹Section 92F-19(a) as adopted by our Legislature is written in the disjunctive and, thus, does not require an agency to meet a two-part test to justify disclosure as is required by section 3-103(a)(1) of the Model Code.

Part III of the UIPA was derived from former chapter 92E, Hawaii Revised Statutes, which in turn was based on a draft version of the Model Code. See H.R. Stand. Comm. Rep. No. 1005-80, 10th Leg., 1980 Reg. Sess., Haw. H.J. 1516, 1517 (1980). Indeed, the commentary to article III of the Model Code, states that it "establishes a statutory framework similar to the Federal Privacy Act, 5 U.S.C. . 552a." For this reason, it is not surprising that like the Privacy Act, one of the UIPA's purposes was to "[m]ake government accountable to individuals in the collection, use, and dissemination of information relating to them." Haw. Rev. Stat. . 92F-2 (Supp. 1990). As such, an examination of the Privacy Act provisions and case law is instructive in resolving the question presented.

The legislative history of the Privacy Act reveals Congress' desire to address what it perceived to be a national discomfort with the government's information gathering practices about American citizens. The early 1970's was a time in which many Americans were concerned about the extent to which government agencies could have, and had, gathered and shared confidential information in their files, whether verified or not. As one court noted, "[o]ne of the goals of the Act was to prevent the federal government from maintaining in one place so much information about a person that that person could no longer maintain a realistic sense of privacy." Britt v. Naval Investigative Service, 886 F.2d 544, 550 (3rd Cir. 1989). In Britt, the court held that the Naval Investigative Services' disclosure of information concerning Britt to the Immigration and Naturalization Service, which was conducting an investigation of possible criminal activity, did not satisfy the requirements of the routine use exception to inter-agency disclosure.

It is this discomfort with information gathering by government agencies that led to the Privacy Act's restriction on inter-agency sharing except, for instance, where sharing is "for a routine use." 5 U.S.C. . 552(a)(7) (1988 & Supp. 1990). Under the Privacy Act, each agency must define and publish its "routine uses" annually in the Federal Register. See 5 U.S.C. . 552a(e)(4)(D) (1988 & Supp. 1990). Similarly, the Privacy Act contains prohibitions on computer matching except where pursuant to express written agreements between the sharing agencies. See 5 U.S.C. . 552(a)(o) (1988 & Supp. 1990). Here again, the legislative history reveals Congress' intent to "discourage the unnecessary exchange of information to another person or to agencies who may not be as sensitive to the collecting agency's

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reasons for using and interpreting the material." Analysis of House and Senate Compromise Amendments to the Federal Privacy Act, reprinted in 120 Cong. Rec. 40, 405, 40, 406 (1974), quoted in Britt v. Naval Investigative Services, 886 F.2d 544, 550 (3rd Cir. 1989).

While our Legislature did not go as far as Congress in restricting agency sharing, it nevertheless was concerned enough to allow its enactments to be guided by the federal case law. The federal courts have held that the Privacy Act's exceptions which permit the inter-agency disclosure of confidential information must be narrowly construed. See, e.g., Swenson v. United States Postal Service, 890 F.2d 1075 (9th Cir. 1989); Tijerina v. Walters, 821 F.2d 789 (D.C. Cir. 1987).

Against this backdrop of legislative and judicial disfavor with the inter-agency disclosure of records about individuals, we now turn to examine whether DPS' request meets the standard imposed by the Legislature in section 92F-19(a)(3), Hawaii Revised Statutes. In OIP Opinion Letter No. 90-9 (Feb. 26, 1990), we, too, concluded that section 92F-19(a)(3) "must be narrowly construed in order to effectuate the clear legislative intention that the UIPA "[m]ake government accountable to individuals in the collection, use, and dissemination of information relating to them." Therefore, we found that disclosure pursuant to this provision is proper only if it reasonably appears to "directly further an agency's performance of its expressed constitutional or statutory purposes and duties, or those that may be fairly implied." State law provides that the purpose of the DPS is to "administer the state personnel program, including personnel development and training and such central personnel services as recruitment, examination, position and pay administration for all departments." Haw. Rev. Stat. . 26-5 (1985).

We are informed that the data collected during the study to be conducted under the contract will assist the DPS in developing programs that meet the needs of the State employees.

A particular area of concern is the potential for the development and placement of child care facilities and, hence, the ages of employees' dependents have been requested.

The development of programs and benefit packages that aid in the retention of employees, while not specifically enunciated in the statute, seems well within the purview of personnel

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development. Moreover, we are satisfied that alternative means of obtaining the information were pursued by DPS as evidenced by the extensive modification of its original request.

Thus, we are of the opinion that to the extent that DPS' contract will require "identification, selection, development, and administration of other employee assistance, counseling, or retention program enhancement" the DPS performs a function within its legislative authority. Therefore, we conclude that the disclosure of employees' dependents' birthdates and employees' social security numbers, in this limited instance, "reasonably appears to be proper for the performance of the requesting agency's duties and functions" and is, accordingly, permissible under section 92F-19(a)(3), Hawaii Revised Statutes.

It is important to recognize that under section 92F-19, Hawaii Revised Statutes, confidential information that is permissibly disclosed by one government agency to another does not lose its confidential status once it is obtained by the receiving agency. The UIPA expressly prohibits the receiving agency from further disclosures of the confidential information it receives. Section 92F-19(b), Hawaii Revised Statutes provides:

(b) An agency receiving government records pursuant to subsection (a) shall be subject to the same restriction on disclosure of the records as the originating agency. [Emphasis added.]

Therefore, neither the DPS nor the SSRI can disclose the social security numbers and dependents' birthdates to any other agency or person unless authorized by section 92F-19(a), Hawaii Revised Statutes. Any such disclosure would be a clearly unwarranted invasion of personal privacy prohibited by the UIPA, and could result in the imposition of criminal or civil penalties. See sections 92F-17 and 92F-27, Hawaii Revised Statutes.

CONCLUSION

The information requested by the DPS is confidential under Part II of the UIPA. See Haw. Rev. Stat. . 92F-13(1). However, section 92F-19(a)(3), Hawaii Revised Statutes, permits the Health Fund to disclose the social security numbers and employees' dependents' birthdates to the DPS in furtherance of DPS' contract with SSRI, so long as it is established that the

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services provided under the contract reasonably appear to be proper for the performance of the duties and functions of the DPS. Finally, under the provisions of section 92F-19(b), Hawaii Revised Statutes, the DPS is bound by the same restrictions on disclosure of confidential records as is the originating agency.

Disclosure by the DPS or SSRI in violation of the UIPA could result in the imposition of civil or criminal penalties under sections 92F-17, and 92F-27, Hawaii Revised Statutes.

Very truly yours,

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APPROVED:

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SAS:sc

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